2014 WL 7891846 (Ill.Cir.Ct.) (Trial Motion, Memorandum and Affidavit)
Circuit Court of Illinois.
Illinois County Department, Law Division
Cook County

Harey ISRAEL, David S. Israel, Alan Israel, and Samantha Israel, Plaintiffs,
v.
Diane ISRAEL, Aaron Israel, and Bruce Bell, Defendants.

No. 2012L003464.
April 18, 2014.

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Diane Israel's Reply in Support of Motion Pursuant to 735 ILCS 5/2-615 to Dismiss Counts 1-9, 12-14 and 16 of the Fourth Amended Complaint

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Hon. Judge Brigid Mary McGrath.

The Fourth Amended Complaint (the “Complaint”) represents Plaintiffs' third attempt to bring claims based on the Illinois Power of Attorney Act before this Court. By their Power of Attorney Act claims, plaintiffs not only seek the revocation of a validly-executed power of attorney, they seek to permanently deprive Aaron Israel of control over his own property and affairs by requesting that a guardian be appointed for him. With respect to each of the prior two iterations of those claims, the Court has rejected proceeding further on the relief requested by Plaintiffs, finding that Plaintiffs had failed to plead a crucial set of facts. Specifically, neither the Second nor Third Amended Complaint made any factual allegations that Aaron Israel suffers from a specific mental infirmity that would restrict Aaron's control over his own power of attorney. The Court's insistence on Plaintiffs providing facts, rather than conclusion or opinion, supports the public policy of Illinois, which is designed to allow individuals to control the disposition of their own affairs for as long as possible. In the Complaint, Plaintiffs do not address the deficiency that doomed their other two efforts. There still are no facts pled that specifically allege an existing mental infirmity that precludes Aaron's control over his power of attorney. The only significant difference between this presentation and the other two failed attempts is the addition of a psychiatrist's report. That report does not purport to address Aaron Israel as an individual because the author has never met or even talked with Aaron Israel, much less given him a medical examination. Therefore, the only opinion that he can provide is that a generic person suffering from “risk factors” that Plaintiffs told him to assume might suffer from mental infirmity. For the reasons set forth below, the addition of the psychiatrist's report yet again does not solve the fundamental problem with Counts 1 and 2 previously identified by the Court, and those counts should be dismissed with prejudice.

As to Counts 3-6, 8, 9 and 12-14, Diane Israel pointed out in her opening Motion that Plaintiffs cannot vindicate rights that belong to Aaron and Aaron alone. As explained more fully below, Plaintiffs cannot stand in Aaron's shoes while he is still living, and their purported (and entirely hypothetical) status as Aaron's heirs does not confer standing on them. As to Count 7, Plaintiffs cite no case in which the common law tort of alienation of affection has been extended to the alleged alienation of the affection of a parent for non-dependent adult children. Finally, as to Count 16, Harey lacks standing as an “heir” because it is only upon Aaron's death that that status can be conferred, so he cannot claim tortious interference with expected inheritance.

We are now well past the point where enough is enough. Plaintiffs have had more than enough chances to put forth a viable complaint, and this Complaint should be dismissed with prejudice so that the litigation ends now.

ARGUMENT

I. *COUNTS 1 AND 2 AGAIN FAIL BECAUSE PLAINTIFFS HAVE NOT MADE A THRESHOLD SHOWING TRIGGERING A HEARING REGARDING AARON ISRAEL'S CAPACITY.*

In her opening brief, Diane Israel demonstrated that Plaintiffs' claims under the Power of Attorney Act (Counts 1 and 2) again fail because they have not pled the prerequisite that Aaron Israel "lacks either the capacity to control or the capacity to revoke the agency" that he created when he originally signed a power of attorney. 755 ILCS 45/2-10(a) (cited at Cmpl. ¶21). On what is now their third attempt, Plaintiffs inserted the conclusory statement, "Aaron Israel lacks either the capacity to control or the capacity to revoke the Power of Attorney given to Defendant Diane Israel for the following reasons." But as before, the reasons given consist of a list of physical ailments of Aaron Israel and a list of purported acts by Diane Israel as their basis for asserting that Aaron Israel lacks capacity. (Opp. 4-9.) While those allegations add some additional factual assertions, the new assertions are simply additional examples of the same two categories of information. The Court found those two categories of allegations insufficient before, and they are no more sufficient now. Plaintiffs now offer the opinion of a doctor who never examined Aaron Israel but who assumes the truth of and recites back those same disputed factual allegations, and opines that they probably could be sufficient. Plaintiffs cannot so easily transform their deficient pleadings merely by having them regurgitated by a doctor.

A. Section 2-10(a) of The Power of Attorney Act Is Designed To Protect Aaron Israel From Too Easily Being Subjected to a Competency Hearing.

Initially, Plaintiffs argued that they did not even have to plead that Aaron Israel lacked capacity to exercise control over or revoke his power of attorney. This Court ruled that such pleading was required under 755 ILCS 45/2-10(a). Then, Plaintiffs argued that all they needed to do was plead those words. This Court rejected that as well, holding that the parroting of 755 ILCS 45/2-10(a) was insufficient and not supported by either Aaron Israel's physical problems or the alleged acts of Diane Israel. (Tr. 11/18/2013 (attached hereto as Exhibit A), p. 35 ("Because right now all you do is state on Paragraph 9 that he has a variety of physical maladies. And then on Paragraph 20 you state he lacks capacity for one or more of the following reasons, basically all of what Diane Israel has been doing. And I need to know what about his condition causes him to be incapacitated.").) Now, Plaintiffs say the insufficient physical maladies and allegations about Diane Israel's actions will suffice if reiterated by a doctor. That is incorrect.

Illinois deliberately erects significant barriers to forcing a principal to defend his own capacity. This starts from the principle that a person whose capacity is sought to be in question is presumed not to lack capacity until proven otherwise. *McCormick v. Blaine*, 345 Ill. 461, 472 (1931). Moreover, the legislature recognizes that adjudication of incapacity means total deprivation of the principal of control over his property. Thus, where petitioners are focused on the principal's financial wealth, there is a conflict of interest between the petitioners and the principal whom they are trying to deprive of his rights to direct his own property. As aptly summarized by Dean T. Jost in discussing amendments to Part 11a of the Probate Act ("Guardians for Disabled Adults"), a statute incorporated into the Power of Attorney Act as discussed below, that strengthened due process protections for those alleged to be incapacitated:

If a guardianship action is seen as a protective proceeding initiated by concerned friends or relatives who seek no advantage for themselves other than the security of knowing that their loved one is properly cared for — to guard the health and promote the best interests of the alleged disabled person — then it may make sense to expedite the rescue attempt and to do as little as possible to discourage the efforts of the solicitous petitioners. The literature suggests, however, that such a sanguine perception of guardianship proceedings is illusory. First, an assumption that guardianship is in the best interests of the ward always must be seriously questioned, despite the immediate appeal of the notion in many cases. ... Second, ***due process is necessary to protect the alleged disabled person from his alleged protectors. There is often a conflict of interest between the guardian***

and ward when the principal issue in the guardianship action is the conservation of a ward's estate. ... Finally, the notion that the state shall not 'deprive any person of life, liberty or property, without due process of law' demands that procedural protections be afforded.

Dean T. Jost, *The Illinois Guardianship for Disabled Adults Legislation of 1978 and 1979: Protecting the Disabled from their Zealous Protectors*, 56 Chicago-Kent L. Rev. 1087, 1088-89 (1980) (hereinafter, "Jost") (emphasis added, footnotes omitted).

That conflict of interest is disturbingly apparent in this case. While the Plaintiffs seek to portray themselves in their brief as Aaron Israel's 'rescuers', seeking to save him from the clutches of a purportedly scheming daughter, the Complaint itself and Plaintiffs' actions in this case to date betray such notions. Most obviously, Aaron Israel is being sued as a defendant in this case to force him to pay for a grandchild's law school tuition. In addition, Exhibit C to the Complaint contains Aaron Israel's own recitation of the facts about how his sons have repeatedly sued him, constantly pressured him about his will, and how this case is nothing more than another attempt to get him to change his will and make dispositions of his property as Plaintiffs demand. (Cmpl. Exh. C, ¶¶ 3-5.) Further, as discussed in Part III below, most of the complaint is about Aaron Israel's property and how Plaintiffs want to control its disposition, rather than heartfelt concern for Aaron Israel's well-being. Indeed, throughout this case Plaintiffs have taken extreme measures to inflict pain on their father Aaron Israel by:

· Insisting on taking his deposition when he told the Court that he is terrified the experience would kill him.

· Seeking to have him arrested for contempt of court when upon medical advice he would not appear for deposition.

· Seeking to have fines imposed against him, and then to have them increased.

No 'rescuer' who truly had Aaron Israel's interest in mind would ever have done such things.

B. The Two Alternative Means of Pleading That a Principal is "Incapacitated" Under Section 2-10(a) of The Power of Attorney Act.

As explained in Diane Israel's opening brief, the significant pleading safeguards that Illinois has put in place to protect principals against spurious hearings are found in the requirements of the Power of Attorney Act that a petitioner show that the principal lacks capacity, *i.e.* is "incapacitated". As Plaintiffs concede, the Power of Attorney Act describes two ways a principal can be considered "incapacitated." *First*, the legislature provided that a principal shall be "considered incapacitated if: (i) a physician licensed to practice medicine in all of its branches has examined the principal and has determined that the principal lacks decision making capacity; (ii) that physician has made a written record of this determination and has signed the written record within 90 days after the examination; and (iii) the written record has been delivered to the agent." (Opp. pp. 13-14, quoting 755 ILCS 45/2-3(c-5).) *Second*, the legislature provided that a petitioner can plead that the principal "is under a legal disability as defined in Section 1 la-2 of the Probate Act of 1975." (Opp. p. 10, citing 755 ILCS 45/2-3(c-5), incorporating 755 ILCS 5/1 la-2.) Thus, under the second alternative, the legislature borrowed the statutory scheme from Part 11a of the Probate Act of 1975.

C. Plaintiffs Failed to Plead That Aaron Israel is "Incapacitated" Under The First Method Because They Have No Physician Who Examined Him.

Plaintiffs did not comply with the first method because Dr. Obolsky never examined has to decide all of those issues on its own, without reference to anything else. Plaintiffs claim the General Assembly incorporated into the Power of Attorney Act just Section lla-2 of the Probate Act, and that the Court must ignore all other sections. (Opp. 10.) As they did in response to the previous motion to dismiss, Plaintiffs reject all other provisions of the Probate Act, violating principles of statutory construction while leaving the Court with no guidance about how it should apply the requirement that Aaron Israel be shown to be a "disabled person."

At the threshold, Plaintiffs have no business making any argument that the full guardianship statute does not apply to them. Lest there be any doubt about where Plaintiffs fall within the statutory scheme, *Plaintiffs specifically pray for the appointment of a "guardian of Aaron Israel's person and estate"*. (Cmpl. p. 15, ¶B.) Plaintiffs completely ignore this when advising the Court not to look to the guardianship statute, but their own allegations establish that Part 1 la of the Probate Act must be applied in full.

Even if Plaintiffs were not seeking appointment of a guardian, their argument that the Court should ignore all but § lla-2 of the Probate Act when adjudicating claims under the Power of Attorney Act still fails. Plaintiffs' sole support for that argument is that the Power of Attorney Act's definition of "incapacitated" only expressly refers to Section lla-2 of the Probate Act. (Opp. p. 10.) Actually, the definition of "incapacitated" refers to one who is under a "disability," which the Act defines as part of the definition of the word "disabled person" at 755 ILCS 45/2- 3(c). The Power of Attorney Act's definition of "disabled person" also refers to the Probate Act, and not just to any one section but the entire Act:

"Disabled person" has the same meaning as in the "Probate Act of 1975", as now or hereafter amended. To be under a "disability" or "disabled" means to be a disabled person.

755 ILCS 45/2-3(c). Both "incapacitated" and "disabled" are used throughout the Power of Attorney Act to refer to contingencies when the principal stops being able to manage their own for guardianship of a person under a legal disability when courts adjudicate petitions under the Power of Attorney Act seeking a finding that a principal is under a legal disability.

Additionally, the guardianship petition requirements also should not be ignored for the independent reason that the Court is entitled to seek guidance from any analogous authorities. Here, there are no reported cases interpreting the requirements of the first sentence of Power of Attorney Act § 2-10(a). Given that Act's reliance on the Probate Act, it is logical to look for guidance in the statutory scheme that the legislature borrowed from the Probate Act, and on the cases thereunder. A basic rule of statutory construction is that one must construe the statute as a whole. *Jackson v. Bd. of Election Comm'rs of City of Chicago*, 2012 IL 111928 ¶48 ("The statute should be evaluated as a whole, with each provision construed in connection with every other section"). To apply the definition of "disabled" in the Part 1 la of Probate Act, the Court should employ the related provisions and the relevant jurisprudence, rather than be left to its own devices and make up new law (as Plaintiffs want).

For example, the Probate Act specifically addressed the question of how a court can adjudge someone to be a disabled person. Section 1 la-3(a) states: "Upon the filing of a petition by a reputable person or by the alleged disabled person himself or on its own motion, the court may adjudge a person to be a disabled person, but only if it has been demonstrated by clear and convincing evidence that the person is a disabled person as defined in Section lla-2." That sounds remarkably close to the provision of the Power of Attorney Act at issue in Counts 1 and 2, 755 ILCS 45/2-10(a). Other provisions of the Probate Act explain how the adjudication of disability takes place. Those other provisions include requiring the filing of a "petition for adjudication of disability" setting forth specific facts (§ lla-8) backed by qualified medical findings describing "the nature and type of the respondent's disability" and various other items (§ 1 la-9). (*See* Mot. at pp. 4-5.) Those provisions balance the need to protect principals from unscrupulous agents with the need to protect principals from unscrupulous "interested persons" who wish to interfere with a principal's right to manage their own affairs. Indeed, the medical findings requirement thus performs a critical function, requiring corroborating independent medical opinion to prevent the triggering of a competency hearing on the basis of mere allegations. As shown in Diane Israel's opening brief (Mot. p. 6), that is why courts insist on a competent medical report from a doctor who actually evaluated the principal. *See, e.g.*, *In re Estate of Hartley*, 2013 IL App (3d) 110264, ¶¶56-61; *Williams v. Estate of Cole*, 393 111. App. 3d 771, 779-780 (1st Dist. 2009).

2. Counts 1 and 2 Again Fail to Allege How Aaron Israel is Incapacitated.

In granting Diane Israel's motion to dismiss the Third Amended Complaint, the Court found that while Plaintiffs had alleged a list of purported physical ailments of Aaron Israel, and another list of purported things Diane Israel has done by which she supposedly dominates Aaron Israel's environment and keeps him isolated, none of those allegations were sufficient to plead

that Aaron lacked capacity to control or revoke his power of attorney. (Exh. A., Tr. 11/18/2013 p. 35.) The Fourth Amended Complaint repeats the same error, albeit with some limited additional detail. Physical ailments of Aaron Israel were insufficient before, because Plaintiffs never alleged how those maladies affected his capacity. "[T]o simply establish certain disabilities is alone insufficient to support the determination of incompetency, the evidence must also show the respondent's incapability of managing her person or estate." *Matter of McPeak's Estate*, 53 Ill. App. 3d 133, 136 (1st Dist. 1977). (*See* Exh. A, Tr. 11/18/13, pp. 27 ("Paragraph 9 talks about some physical complaints, but there's nothing regarding any lack of capacity pled"). *McPeak* is particularly instructive. There, the court held (*id.*, 53 Ill. App. 3d at 136):

In the case at bar, the petitioner's evidence merely established the respondent's weakening of vigor, skill and acuity which is a normal concomitant to advanced years. That respondent also suffered from a heart ailment and a shortness of breath is undisputed by her. However, to simply establish certain disabilities is alone insufficient to support the determination of incompetency, the evidence must also show the respondent's incapability of managing her person or estate.

Plaintiffs' allegations about Aaron Israel's advanced age, medications, bereavement, isolation and being dominated and controlled by Diane Israel that are now alleged at Cmpl.¶¶ 22.A and 22.B (see Opp. pp. 4-9) were already alleged in the Third Amended Complaint at ¶¶ 8-9, 20 and argued extensively in Plaintiffs' opposition brief, [1] but were found to be insufficient to plead lack of capacity. The new pleadings adds the additional physical conditions of hearing loss and depression (Cmplt. ¶¶ 22.A.viii and 22.A.iii), but there is no pleading that those conditions leave him without the capacity to manage his power of attorney. The Complaint merely alleges that they contribute to his alleged social isolation, and that his "depressed emotional condition diminishes his ability to make independent judgments and decisions," but there is no actual allegation that they cause him to be incapacitated. Moreover, as shown in *McPeak*, such disabilities do not make him incapacitated. Likewise, the pleadings about Diane Israel's actions have been expanded, but they still constitute allegations about Diane Israel that have nothing to do with whether or not Aaron Israel lacks capacity. (Exh. A, Tr. 11/18/2013 pp. 27, 32 (allegations fixated on actions of Diane Israel, not on how Aaron Israel incapacitated).)

3. Plaintiffs' Psychiatrist Report Does Not Remedy the Failures of Plaintiffs' Pleadings in Counts 1 and 2.

This Court specifically informed Plaintiffs that to state a claim in Counts 1 and 2 they must come forward with sufficient additional facts that show Aaron Israel lacks capacity. When Plaintiffs argued to the Court that they were in a "Catch-22" because they could not examine Aaron Israel and obtain such facts needed to state a claim, the Court expressed surprise that they had already pled without such a basis, and noted that they may well be unable to re-plead Counts 1 and 2 successfully at this point in time. (Opp. Ex. 5, Tr. 11/22/2013 at pp. 11-13.) Instead of accepting that they do not have the required facts, Plaintiffs simply tried again by having their insufficient allegations about physical maladies, social isolation and domination/control by simply repeated by a psychiatrist, Dr. Obolsky. However, he never examined Aaron Israel, talked only with Plaintiffs and got only their side of the story, and does not opine about Aaron Israel's actual current condition. If accepted, Plaintiffs' strategy effectively would do away with the safeguard of the medical findings requirement and allow competency hearings and guardianship proceedings to be convened upon a party's mere unsubstantiated allegations assumed to be true by, and regurgitated by, a doctor.

Dr. Obolsky's report consists of a menu of "risk factors" that an older adult is "vulnerable" and might lack the capacity to control or revoke his power of attorney agency. He then recites a series of factual bullet points that regurgitate Plaintiffs' allegations about Aaron Israel's supposed condition and about purported acts by Diane Israel, reciting them as though various "risk factors" are *in fact* present. (Cmplt. Ex. G, pp. 2-3.) Based on this, he opines "with a reasonable degree of forensic medical and psychiatric probability that [Aaron] Israel lacks the capacity to control and the capacity to revoke the agency exercised by his daughter, Ms. Diane Israel." (*Id.*, p. 1.) However, he never examined Aaron Israel, so he has no basis to actually opine regarding Aaron Israel's true capacity. He also did not speak with any Defendant. He did not even seek to speak with Aaron's doctors, and only read their affidavits, none of which is more recent than May 2013. The only people he actually talked to were Aaron's sons, in off-the-record, *ex parte* interviews that were not under oath. (*Id.* p. 1.) Those are the same people who are suing Aaron now and who have been after him to make gifts and estate plans for their benefit for years. (Cmplt. Ex. C, ¶¶ 3-5.) Virtually all of Dr.

Obolsky's factual recitations about Aaron's current situation and about Diane Israel (Cmplt. Ex. G. pp. 2-3) are based entirely on assuming the truth of what he was told by Plaintiffs. In short, he regurgitates Plaintiffs' allegations and then opines that someone in that situation probably would lack capacity to manage his power of attorney. In other words, his opinion is merely that a generic person with assumed characteristics would be more likely to lack capacity, not that Aaron Israel actually lacks capacity. Dr. Obolsky's report actually adds nothing to the allegations that have already been shown to be insufficient because he simply restates Plaintiffs' allegations, and draws the conclusions that the Court has twice rejected.

Such a strategy attempts to work an end-run around the statutory procedural protections afforded principals like Aaron Israel. [2] If, as before, all Plaintiffs had was their own unsubstantiated allegations, it would be insufficient because of the lack of any showing that Aaron Israel lacks capacity. *See, e.g.*, *McPeak*, 53 Ill.App.3d at 136. That was the basis of this Court's ruling granting Diane Israel's motion to dismiss the Third Amended Complaint. Now, Plaintiffs want to insert an expert who assumes that the *ipse dixit* of the sons is true, and on that basis opines that someone like Aaron is probably lacking in capacity. The whole point of the threshold requirement of a doctor's report is the gatekeeping function of making sure the petitioner has a real basis to claim the need for a hearing and is not merely trying to shoot first and ask questions later. Thus, the expert must not assume the truth of anything; he must instead formulate his own opinion based on an examination of the patient. A doctor's opinion based merely on the assumption of the truth of a petitioner's factual allegations offers no opinion about whether a patient is or is not presently incapacitated. Nevertheless, that is precisely the opinion the Court needs to receive to corroborate the movant's allegations in the petition, and provide it with validity with regard to the question of whether to convene a competency/guardianship hearing. That is why the statute requires it. No such opinion has been offered by Plaintiffs.

Despite its failings, Plaintiffs attempt to rescue Dr. Obolsky's report in three ways. *First*, they argue that it tracks the requirements of § 1 la-9 regarding the contents of the report accompanying a petition. (Opp. 12-13.) Plaintiffs are wrong. Most fundamentally, the report fails to satisfy the second requirement, that Dr. Obolsky provide "an analysis and results of evaluations of the respondent's mental and physical condition and, where appropriate, educational condition, adaptive behavior and social skills, which have been performed within 3 months of the date of filing of the petition." 755 ILCS 5/lla-9(a)(2). Dr. Obolsky never performed an evaluation of Aaron Israel's mental and physical condition. Assuming it would even be permissible for purposes of the statute (which Diane Israel does not concede), Dr. Obolsky also never says he relied on such an evaluation performed by anyone else. Even if the declarations of Aaron Israel's doctors were considered reports of the kind of evaluations the statute has in mind (which they clearly were not because they only address whether he is physically strong enough to attend a stressful deposition), none of those declarations are less than eight months old. Incredibly, Plaintiffs assert that everything is OK because Dr. Obolsky read those old declarations within three months of the date he filed his report. (Opp. p. 13.) However, the short time limit in § lla-9(a)(2) cannot be interpreted to mean only that the analysis of someone else's evaluation of the patient has to have been performed within the past three months. There is no point to the three-month requirement if it merely means an expert can look at an evaluation from years ago and then issue a report about the patient's condition with today's date as though it were a current analysis. Rather, the only sensible interpretation of the statute is that the underlying examination of the patient has to have taken place within the past three months. That requirement was not met here.

Second, even assuming it were permissible to revive old evaluations by issuing a "current" report based on them, Plaintiffs assert that there is nothing wrong with experts relying on such hearsay instead of performing their own first-hand examination of the patient. (Opp. p. 15-16.) While § lla-9(a)(2) is not a model of clarity on that point, the case law cited in Diane Israel's opening brief (Mot. p. 6) makes clear that Dr. Obolsky was required to personally examine Aaron Israel before issuing an opinion about whether he is incapacitated. *In re Estate of Hanley*, 2013 IL App (3d) 110264, ¶¶ 56-61; (affirming finding that son's affidavits and report of doctor who had never examined father were too remote and did not establish current disability as required by the statute); *Williams v. Estate of Cole*, 393 Ill. App. 3d 771, 774, 779-780 (1st Dist. 2009) (affirming striking of plaintiff's affidavit of psychiatrist who had never personally examined respondent, and affirming grant of motion to dismiss Section 11 a-8 petition and motion to invalidate power of attorney). [3]

Likewise, the hearsay point is merely another side of the medical examination coin. Here, Dr. Obolsky relied exclusively on hearsay in considering whether or not Aaron Israel is incapacitated, including lots of disputed second-hand claims by Plaintiffs

and other non-medical individuals. Plaintiffs simply omit the most critical thing that Dr. Obolsky based his opinion on. Plaintiffs say only that "[t]he information Dr. Obolsky relied upon to determine whether any of the known risk factors apply to the present case is either undisputed or based on sworn testimony of Aaron Israel's treating physicians, statements of law enforcement personnel who are under a legal duty to provide accurate information in reports they prepare, or on statements of Aaron Israel and his counsel." (Opp. 15.) Plaintiffs repeat that misrepresentation in their conclusion. (Opp. 27.) In reality, Dr. Obolsky's report says he also relied on interviews with Plaintiffs David Israel, Harey Israel and Alan Israel — the people who hired him — in which they told Dr. Obolsky whatever they wanted to say, none of which was sworn or on the record. Who knows what they told him? It certainly isn't "undisputed." He also relied on the deposition of Plaintiffs' paid expert, Dr. John Markis, yet another doctor who never met Aaron Israel and yet claimed to have the most extraordinary ability to testify as to Aaron's medical status. His testimony is far from "undisputed" — Aaron Israel filed papers disputing it.[4] Moreover, Dr. Obolsky also says he relied on the declaration of Officer Edward Santiago (Cmplt. Ex. A), which Diane Israel absolutely does dispute because it contains material misstatements. Diane Israel sent a letter to Officer Santiago's police department pointing out those misstatements, which she attaches hereto as Exhibit B —not for the Court to decide who is right but only for purposes of showing that the Santiago declaration is disputed.[5]

Third, Diane Israel showed that the statute requires the allegation, backed up by an examining doctor's report, that Aaron Israel *actually is* incapacitated, whereas Dr. Obolsky merely opined that he *probably* was incapacitated. (Mot. p. 6.) Plaintiffs try to salvage Dr. Obolsky's opinion by arguing that courts have long allowed experts to testify in terms of probabilities, citing *Marston v. Walgreen Co.*, 389 Ill.App.3d 337 (1st Dist. 2009), and *Mikus v. Norfolk & Western Ry. Co.*, 312 Ill.App.3d 11 (1st Dist 2000). Those cases stand for the proposition that experts are allowed to opine about *proximate causation*, not the existence of an injury, in terms of probabilities. In personal injury cases, a plaintiff must establish that he is injured and that he got that way because of the defendant. As in *Marston* and *Mikus*, the expert opines about proximate causation after assuming the injury exists and thinking about whether the defendant's conduct caused it. But here the issue is quite different. Whether there is any injury at all - that is, whether Aaron Israel lacks capacity - is itself the matter in issue. Plaintiffs cannot use an expert to express in terms of probability whether Aaron Israel is injured. The statute requires that they actually allege that he is injured (i.e. lacks capacity). (Exh. A, Tr. 11/18/2013 p. 32 ("I think there has to be an incapacity pled, his [Aaron's] incapacity"); 755 ILCS 45/2-10(a) (requiring that "the principal lacks capacity"); 755 ILCS 45/2-3(c-5) (defining a principal who is "incapacitated" as meaning "that the principal is under a legal disability as defined in [755 ILCS 5/lla-2]" (emphasis added)). This demonstrates what is wrong with Plaintiffs' entire approach — Dr. Obolsky merely says that generic people with certain risk factors might lack capacity, but he does not say that Aaron Israel in fact does lack capacity. He does not determine whether Aaron Israel has those risk factors, he simply regurgitates Plaintiffs' assertions that Aaron Israel does. Nor does he opine that those risk factors actually have led Aaron Israel, as opposed to a generic everyman vulnerable adult, to lose capacity. That falls far short of the statutory requirement that a petitioner seeking to deprive a principal such as Aaron Israel of his civil rights must allege that this particular principal really does lack capacity.

II. *PLAINTIFFS FAILED TO REBUT DIANE ISRAEL'S SHOWING THAT THEY LACK STANDING TO PROSECUTE COUNTS 3-6, 8-9 AND 12-14, AND THOSE COUNTS SHOULD BE DISMISSED.*

In her opening brief, Diane Israel amply demonstrated that Plaintiffs were improperly attempting to prosecute numerous counts in which Aaron Israel allegedly was harmed by Diane Israel (and for several counts, Bruce Bell) through the diminishment or misappropriation of his property. A survey of the claims quickly demonstrates Plaintiffs' lack of standing:

Count	Allegations, In Part	Prayer, In Part	Injured Parties
3&12	Diane Israel "breached her fiduciary duty to Aaron Israel" by "misappropriating assets from the estate of Aaron Israel	Judgments "awarding the estate of Aaron Israel compensatory damages" (Cmplt. pp. 20-21)	Aaron Israel, plus Harey Israel, David Israel and Alan Israel as Aaron Israel's "descendants, presumptive heirs-at-law, and

	to the detriment of Aaron Israel's other heirs, descendants and successors-in-interest." (Cmplt. ¶ 46.) Bruce Bell aided and abetted this. (*Id.*. ¶(106.)		successors-in-interest" (Cmplt. ¶¶46.A, 50, 111)
	(165)B2	(172)B2	
4	Diane Israel unduly influenced Aaron Israel to get him to appoint her as his agent under powers of attorney by which she transferred "assets of Aaron Israel" to her own account	Judgment "awarding the estate of Aaron Israel compensatory damages." (Cmplt. pp. 25-26)	Aaron Israel (Cmplt. ¶ 54), plus Harey Israel, David Israel and Alan Israel and Aaron Israel's "other heirs, descendants and successors-in-interest" (*Id.* ¶ 55. A)
	(101)B2	(152)B2	
5&13 (14)	Diane Israel defrauded Aaron Israel by transferring "assets of Aaron Israel" to her own accounts (Cmplt. ¶ 59); Bruce Bell aided and abetted, and he conspired with Diane Israel. (*Id.* ¶¶ 116-120; 124.)	Judgment ordering Diane Israel to pay back "the estate of Aaron Israel." (Cmplt. pp. 29-30)	Aaron Israel, plus Harey Israel, David Israel and Alan Israel as "the heirs, descendants and successors-in-interest of Aaron Israel" (Cmplt. ¶ 59)
	(133)B2	(144)B2	
6&13 (14)	Aaron Israel relied on Diane Israel and she gained a pecuniary advantage over him that makes her liable to Aaron Israel for constructive fraud (Cmplt. ¶¶ 66-67); Bruce Bell aided and abetted, and he conspired with Diane Israel. (*Id.* ¶¶ 116-120; 124.)	Judgment ordering Diane Israel to pay back "the estate of Aaron Israel." (Cmplt. p. 33)	Aaron Israel, plus Harey Israel, David Israel and Alan Israel as Aaron Israel's "heirs, beneficiaries, successors-in-interest, fiduciaries and descendants" (Cmplt. ¶67)
	(142)B2	(168)B2	
8	Diane Israel engaged in conversion of "property of the estate of Aaron Israel." (Cmplt. ¶¶ 83-86)	"The estate of Aaron Israel demands Defendant Diane Israel renounce possession of the property [belonging to the estate of Aaron Israel]." (Cmplt. ¶88)	Aaron Israel, plus Harey Israel, David Israel Alan Israel as "the direct and intended beneficiaries of the fiduciary duties Defendant Diane Israel owes to Aaron Israel." (Cmplt. ¶ 83.)
		(134)B2	(184)B2
9	Diane Israel "unjustly retained the benefits of the assets misappropriated from Aaron Israel's estate." (Cmplt. ¶90)	Judgment ordering Diane Israel to pay back the amount by which she was unjustly enriched	Aaron Israel, plus Harey Israel, David Israel and Alan Israel as Aaron Israel's "heirs, descendants, beneficiaries, and successors-in-interest" (Cmplt. ¶91)

_____ _____(156)B2

As shown by the table above, in each of the above counts Plaintiffs Harey, David and Alan Israel are attempting to assert rights belonging to Aaron Israel, claiming that Aaron Israel's property has been misappropriated and/or that his donative intent was blocked. In each count, some or all of the relief they seek is the payment of money into Aaron Israel's "estate." It is obvious from Plaintiffs' own words that they are attempting to stand in Aaron Israel's shoes and assert claims they allege he has against Diane Israel and Bruce Bell.

Illinois law does not permit that. As pointed out in Diane Israel opening brief (Mot. p. 9), Plaintiffs are only allowed to bring claims to enforce rights belonging to them or to obtain redress for their own injuries. *American Drug Stores, Inc. v. AT&T Technologies, Inc.*, 222 Ill. App. 3d 153, 155-56 (2nd Dist. 1991) ("A cause of action must be based on the injury suffered by the plaintiff, not on alleged injuries suffered by nonlitigants"). *See also Wexler v. Wirtz Corp.*, 211 Ill. 2d 18, 23 (2004) (doctrine of standing is to insure that issues are raised only by those parties with a real interest in the outcome of the controversy). Plaintiffs have no actual interest in Counts 3, 4, 5, 6, 8, 9, 12, 13 and 14 because they have suffered no injury to themselves, nor will they obtain any present benefit from a plaintiff's verdict on those Counts adding property back to Aaron Israel's collection of assets. *See, e.g., Board of Trustees of Community College Dist. No. 508 v. Rosewell*, 262 111. App. 3d 938, 954 (1st Dist. 1992). Plaintiffs failed to acknowledge any of those authorities, thereby conceding the point.

Without standing to do so, Plaintiffs really just want to usurp Aaron Israel's rights and take over his affairs. If Aaron Israel thought his property was being misappropriated or his donative intent thwarted, he could assert his own cross-claims in this case, through his own counsel. Tellingly, Aaron Israel has never asserted any such claims. Plaintiffs have no standing to try to do it themselves as though in a representative capacity. While the law recognizes situations in which proceedings are permitted by a representative (*e.g.*, class member or bankruptcy trustee), Plaintiffs allege no basis for assuming such a mantle for Aaron Israel, so they lack standing. *See, e.g., In re Estate of Henry*, 396 Ill. App. 3d 88, 94 (individual who is not ward's guardian lacks standing to appeal a decision of the circuit court on behalf of ward).

Not only do Plaintiffs try to assert Aaron Israel's claims personally as if they were stand-ins for Aaron Israel himself, they simultaneously purport to assert the same claims on the basis that they are Aaron Israel's "presumptive heirs-at-law," "descendants," "beneficiaries" or "successors-in-interest." Yet, as Diane Israel showed in her opening brief, none of those labels confers standing because there is no such thing as "heirs" or an "estate" of Aaron Israel while he remains alive. Diane Israel cited numerous authorities going back to the 1870s that in Illinois no one can call themselves an "heir," "heirs-at-law," or some other similar moniker, while a testator is still alive because no one knows what will happen — the testator can do whatever he wants to with his property, or creditors could eat up the anticipated inheritance — so the "estate" and the "heirs" only ripen into existence and become fixed upon the death of the testator. (Mot. 9-11.) She also demonstrated that, while Illinois law recognizes certain types of non-natural persons as capable of being a party to litigation - such as corporations, partnerships, and bankruptcy estates, it only confers that status upon a person's "estate" when they die and their probate estate is administered. (*Id.*, citing *People v. Waitches*, 290 Ill.App. 402, 407 (1st Dist. 1937).) Remarkably, Plaintiffs did not address in their opposition brief even one of the six cited authorities. Thus, they concede that the "estate of Aaron Israel" on whose behalf they brought the above counts, does not yet exist as a litigant under Illinois law. Likewise, they concede that no one can be the "heir" of a living person, so Plaintiffs have no right to sue in that capacity.

Nevertheless, Plaintiffs plow ahead, referring to themselves as Aaron Israel's "heirs-at-law" and talking about Aaron Israel's "estate", completely ignoring Diane Israel's authorities. (Opp. pp. 17-19.) All of the authorities that Plaintiffs cite for the proposition that they have suffered harm actually do not stand for any such thing:

· *"Heirs-at-Law" Cases*. Plaintiffs assert that as Aaron Israel's natural born sons, they are his "heirs-at-law," citing *Dillman v. Dillrnan*, 409 Ill. 494 (1951), and *People ex rel. George v. Nelms*, 241 Ill. 571 (1909). (Opp. 18.) Neither of those cases is remotely applicable here. *Dillman* merely interpreted the meaning of the term "heirs-at-law" as used in a decedent's will, while *George* interpreted an inheritance tax statute as applied to a daughter who inherited when her father died. In both cases, then,

there was a decedent. His death established who his heirs are. Neither case is contrary to Diane Israel's authorities that "heirs" do not exist while a testator is alive.

· *Trust Beneficiary Cases*. Plaintiffs assert that a beneficiary of a trust has standing to seek restitution on behalf of the principal where there was a breach of fiduciary duty to the principal, citing *Chicago Park Dist. v. Kenroy, Inc.*, 78 111.2d 555 (1980), and three other cases. (Opp. 18). None of those authorities are applicable because Plaintiffs here have not alleged that Aaron Israel is the settlor of a trust of which they are the beneficiaries. Those authorities are not useful by analogy either, because a trust beneficiary's standing flows from the fact that a trust has come into effect and its terms convey some actual beneficial interest, whether immediately vesting or remote. Here, no instrument has yet taken effect so there are neither beneficiaries nor a corpus.

· *Creditor Cases*. Plaintiffs assert that *Spring Valley Nursing Ctr., L.P. v. Allen*, 2012 IL App (3d) 110915, is an "analogous" case where a "mere creditor" with "more remote interests in the principal's estate than the Plaintiffs had sufficient standing to pursue claims for misappropriation by wayward agents." (Opp. p. 19.) *Spring Valley* is not analogous at all because the party suing was a *judgment* creditor who initiated citation proceedings to investigate where the debtor's assets were, found that debtor's agent had fraudulently transferred assets to himself, and obtained a turnover order. *Id.*, ¶ 1. A judgment creditor who serves a citation obtains a lien on all the judgment debtor's assets, including her chaoses in action, such as for return of funds fraudulently transferred. 735 ILCS 5/2-1402(c)(l). In contrast, Aaron Israel's sons are not his creditors at all. Aaron Israel does not owe them any part of his property. He does not have to name them in his will or give them *inter vivos* gifts if he does not want to. Thus, whatever may be happening to Aaron Israel's property while he is alive is none of their concern because they have no legal rights in it. Plaintiffs' attempt to claim that "mere creditors" somehow have less rights than they do gets it exactly backwards: the law confers standing on actual judgment creditors, but not on expectant relatives.

· *Executor Cases*. Plaintiffs assert that a decedent's heirs are permitted to sue the administrator of the estate for breach of fiduciary duty, citing *Priestly v. Priestly*, 949 S.W.2d 594 (Ky. 1997). That case is inapplicable here because it was filed after the decedent died, and was brought by parties who could demonstrate that they were the intestate decedent's heirs. *Id.* at 597. Plaintiffs have cited no authorities (even from jurisdictions outside Illinois) negating the long-held proposition of Illinois law that until a person dies, no one can claim standing as his "heirs."

Realizing that they have no standing to assert Aaron Israel's claims, whether on his behalf or their own as parties who hope to receive some of his property one day, Plaintiffs resort to arguing that the rules of standing should be relaxed here for practical and policy reasons. (Opp. pp. 20-22.) The doctrine of standing simply is not that flexible. As the black-letter law cited by Plaintiffs and Defendants establishes, the doctrine of standing requires that to be a plaintiff one must personally have a real interest in the outcome of the action. (Opp. p. 17; Mot. p. 9.) This is a yes-or-no proposition; either you have standing or you do not. Plaintiffs argue that the rules should be bent here because (a) Diane Israel is allegedly "the executor of Aaron Israel's estate" and is unlikely to have the estate bring claims against herself after Aaron Israel's death; (b) the Complaint alleges **elder abuse** and public policy is in favor of allowing it to proceed; and (c) waiting for Aaron Israel to die is unjust because he is an important witness. (Opp. pp. 22-23.) In other words, Plaintiffs advocate that exceptions should be allowed, so that parties without standing might be able to bring claims anyway depending on how egregious the subject-matter supposedly is. That ignores the fact that the standing inquiry focuses on the party seeking to assert rights, not the subject-matter of the case. *People v. $1,124,905 U.S. Currency & One 1988 Chevrolet Astro Van*, 177 Ill. 2d 314, 685 N.E.2d 1370, 1377 (1997) ("The primary focus of the inquiry is whether a party has a real interest in the outcome of the controversy"). The law of standing simply does not allow for such exceptions. Even if it did allow exceptions, none of the exceptions Plaintiffs advocate carry any weight. *First*, as explained above, there is no such thing as an "estate" because Aaron Israel remains alive. Thus, there is no "executor" of his "estate." If Plaintiffs mean to allege that Diane Israel will be appointed the executor of Aaron Israel's estate when he dies, they are merely speculating. As the plaintiffs in *Priestly* did, Plaintiffs have to wait for the appointment to occur. *Second*, a complaint is nothing more than an unsubstantiated claim. A plaintiff does not have standing to bring a claim just because he says it is directed at **elder abuse**. There is no sliding scale for standing, as though one's legal right to sue varies with the severity of the allegations. *Finally*, Plaintiffs' third argument is pure bootstrapping. The fact that a person might be an important witness to a claim is irrelevant if the plaintiff has no standing to bring the claim in the first place. Plaintiffs cite no authority

for allowing the kind of pre-death will contest that they propose. Plaintiffs mischaracterize Diane Israel's arguments by saying "Defendant claims Plaintiffs must wait until Aaron Israel dies before they have standing to pursue their claims [in Counts 3-6, 8-9 and 12-14]." (Opp. pp. 16- 17.) Diane Israel's point is that no one knows yet whether Plaintiffs (as opposed to Aaron Israel) have any legally cognizable interest conferring standing for any of those claims in the first place. Plaintiffs certainly have no standing to bring those claims before Aaron Israel's death.

III. HAREY AND ALAN ISRAEL HAVE NO STANDING TO PURSUE CLAIMS *UNDER THE ALIENATION OF AFFECTIONS ACT (COUNT 7)*.

In her opening brief, Diane Israel showed that the common law tort of alienation of affections was never intended to provide a cause of action for adult, non-dependent children to sue one another for causing a parent to stop having affection for them. The cause of action originally only belonged to a spouse, who could sue a paramour who wooed away their husband or wife. In *Johnson v. Luhman*, 330 Ill. App. 598 (2d Dist. 1947), Illinois allowed a spouse's minor children to have standing as well, because "minor children herein have a right to protect their relationship with their parents and are properly entitled to seek damages from one who has destroyed their family unit." *Id.* at 607. The furthest that Illinois has ever gone with letting children sue for alienation of affections is to allow minor children to sue someone who wooed their mother or father away.

If a plaintiff wishes to bring a cause of action, by definition it must exist or else the claim fails. *Lykowski v. Bergman*, 299 Ill.App.3d 157, 163 (1st Dist. 1998) (to survive § 2-615 motion, complaint must state "a legally recognized claim upon which the plaintiff is entitled to damages"). But here, Plaintiffs have not cited a single case in which a court has allowed an adult o sue a sibling (or anyone else) for causing their parent's affections to depart. That is because no court has recognized such a cause of action. The reasons are both historical and practical. Historically, the tort of alienation of affections originated as a matter of the law of husband and wife, "with the common-law belief that wives were the chattel of their husbands." 54 Am. Jur. Proof of Facts 3d 135 § 2. Over time, as womens' rights became recognized, the tort came to be seen as a means to preserve marital harmony by preventing wrongful interference. *Id.* When Illinois allowed minor children to sue along with their parent, it sought to preserve marital harmony and financial support while the children were still minors. *Johnson*, 330 Ill. App. at 607 ("Defendant's conduct resulted in the destruction of the children's family unit — that fortress within which they should find comfort and protection at least until they reach maturity — and deprived them of the unstinting financial support heretofore contributed by their father, as well as of the security afforded by his affection and presence"). Plaintiffs cite no case in which an adult son or daughter has been permitted to sue anyone for alienation of their parent's affection. No such cases exist. [6]

Moreover, from a practical perspective, the judicial system not in the business of regulating adult sibling rivalry over parental love. In response to Diane Israel's brief, Plaintiffs did not cite a single authority suggesting otherwise. Instead, they cited language from *Johnson v. Luhman* about the need "to protect the family relationship." (Opp. p. 23.) As noted above, *Johnson* only involved minor children, and provides no basis to suggest that Illinois courts allow siblings to sue each other alleging that a parent was caused to favor one over the other. Plaintiffs offer no definition of the scope of the conduct that would be actionable to "protect the family relationship." That scope must be limited to the fact pattern present in *Johnson* or there will be no end to lawsuits over intra-family dynamics and sibling rivalry, claiming everything from "you took advantage of the fact that Dad loved you more than me" to "you always got Dad to do what you wanted and not what I wanted" as actionable wrongs. This Court should resist Plaintiffs' invitation to take the tort of alienation of affections into places where it has never been.

Plaintiffs' opposition relies on four incorrect arguments. *First*, they argue that the tort has been codified in the Alienation of Affections Act. (Opp. p. 24.) That is not true; the Act only limits the damages available. 740 ILCS 5/2 and 3 (limiting recovery to actual damages and barring punitive damages). *Second*, Plaintiffs imply that the purpose of the Act is to implement a public policy in favor of "protecting the family relationship." That is nonsense. The preamble to the statute expressly states that the tort was being horribly misused and the Act was passed to limit damages in order to curb the "grave **abuses**" of plaintiffs using the tort for "blackmail". [7] *Third*, Plaintiffs argue that not only minors have standing to sue under the tort, as evidenced by the fact that the cases permit adults to bring claims. (Opp. 23-24, citing *Hargan v. Sw. Elec. Coop., Inc.*, 311 Ill.App.3d 1029 (5th Dist.

2000) (adult spouse sued). That misstates Diane Israel's argument. Her point was that the tort is limited to claims by spouses and minor children against paramours who woo away the other spouse. (Mot. pp. 11-12.) Of course spouses are adults.

Fourth, Plaintiffs improperly argue that when the Act says it should be "liberally construed" to effectuate the "public policy as herein declared," it means the tort should be liberally construed to achieve the purpose of "protecting the family relationship". (Opp. p. 24.) That misstates the statute. Again, its purpose was to scale back damages. Plaintiffs' failure to honor that purpose is evident in their prayer for punitive damages, which violates 740 ILCS 5/3. (Mot. p. 12 n.7.) In contrast to liberal construction of the damages-limiting statute, the tort itself must be "subject to close and strict judicial scrutiny." *Hargan* at 1031; *see* Mot. p. 12. Thus, it should be limited to claims by spouses and their minor children, and Harey and Alan Israel (both adults) cannot sue their sister under that tort for allegedly turning their father's affections away.

Finally, it should be noted that the Complaint reveals that Aaron Israel himself complained that his sons engaged in a pattern of harassing and frightening him, sued him multiple times (besides suing him as a defendant here), threatened that they would report him to the IRS for unspecified tax crimes if he did not do what they wanted. (Cmpl. Ex. C, ¶¶ 3-5.) Thus, the Complaint shows that Aaron Israel's sons have alienated his affections themselves.

IV. *COUNT 16 FAILS BECAUSE ANY CLAIM OF AN EXPECTANCY OF INHERITANCE IS UNRIPE.*

In her opening brief, Diane Israel showed that Harey Israel's claim in Count 16 that Diane Israel interfered with Harey's expected inheritance of the West Allis Property fails because as long as Aaron Israel remains alive no specific inheritance can be said to exist. (Mot. pp. 12-13.) Diane Israel quoted extensively from *In re Estate of Henry*, 396 Ill. App. 3d 88 (1st Dist. 2009), which is directly on point here, holding that people who hope to inherit have no protectable interest in the testator's property while the testator is yet living. The court specifically held that the type of claim Harey is attempting to bring here is one that only accrues after the testator's death, and is therefore not ripe now. (*Id.* at 98.)

Harey Israel responds by arguing that he pled all of the elements for the claim of tortuous interference with expectancy as recited by *Henry*. (Opp. pp. 24-25.) He is wrong because, as the court made clear in the *Henry* case, the "existence of an expectancy" element fails where the expectancy is of an inheritance and the testator is still living. Harey Israel's argument to the contrary ignores the plain holding of *Henry* and relies on the same arguments asserting the existence of a protectable interest that fail for the reasons discussed in Part II, above.

V. *PLAINTIFFS ARE REQUESTING THAT THIS COURT RECOGNIZE NEW CAUSES OF ACTION, AN ACTION WHICH SHOULD BE RESERVED FOR THE APPELLATE COURTS.*

As to at least three separate issues in this case, Plaintiffs ask that this Court be the first court to recognize certain causes of action.

· *First*, with respect to Counts 1 and 2, Diane Israel has explained the two recognized ways to state a claim under the Power of Attorney Act; (1) an examining doctor's affidavit or (2) allegations meeting the "incapacitated" standards under the Guardianship Act. (*See* pp. 5-6 above.) Plaintiffs request that this Court be the first to allow a third way: a statement from a non-examining physician based on uncorroborated statements made to the physician by plaintiffs.

· *Second*, with respect to Counts 3-6, 8, 9, and 12-14, Diane Israel has explained that no court has ever allowed standing to hypothetical heirs to challenge property transfers made during the lifetime of the at-some-point-decedent. (*See* pp. 18-24 above.) Plaintiffs request that this Court be the first that would ever allow prospective "heirs" to sue as a representative of a still-alive person.

· *Third*, with respect to Count 7, Diane Israel has explained that no Illinois Court has ever extended the common law tort of alienation of affection to non-dependent adult children complaining of loss of parental affection. (*See* pp. 24-27 above.) Plaintiffs request that this Court be the first to allow such a cause of action.

When confronted with requests by plaintiffs to create new causes of action at the trial level, Illinois Appellate Courts have discouraged it. *See, e.g.*, *Harrel v. Dillards Department Stores, Inc.*, 268 Ill.App.3d 537, 548 (5th Dist. 1994) (refusing to recognize a new tort of compelled self-defamation, noting that it is not the province of appellate courts to create new causes of action, but rather the responsibility of our supreme court and/or the Illinois legislature). By asking this Court to permit claims and causes of action heretofore not recognized by the higher courts, Plaintiffs are asking this Court to make new law. While this Court indisputably has jurisdiction to decide the issues presented, the most prudent course of action is for this Court to refuse to extend the law as Plaintiffs request and dismiss this case. Plaintiffs would then be free to request higher courts to recognize a new cause of action. To allow the case to go forward here and permit the parties to take the case through discovery, summary judgment and perhaps trial, with the potential to be reversed on appeal upon rejection of the novel claims, is a far more expensive and wasteful course.

WHEREFORE, for the reasons stated in her opening brief and further discussed above, Defendant Diane Israel prays for the entry of an order: (1) dismissing the Complaint with prejudice; and (2) providing such other and further relief as the court deems equitable and just.

Dated: April 18, 2014

Respectfully submitted,

DIANE ISRAEL

By: <<signature>>

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Footnotes

1 Plaintiffs' Response to Defendant Diane Israel's Motion to Dismiss (filed Oct. 3, 2013), at pp. 9-13.

2 Plaintiffs' strategy with regard to Dr. Obolsky is an attempt to return to the sort of mischief that statutory safeguards were designed to prevent. Under prior guardianship practice, "respondents were routinely stripped of all of their civil rights and property on the basis of a doctor's hearsay statements submitted in affidavit form." Jost at 1095, citing *In re Conservatorship of Browne*, 35 Ill.App.3d 962 (1976), as condemning the practice.

3 Plaintiffs' assertion that Diane Israel cited no case requiring him to have personally examined Aaron Israel before formulating an opinion (Opp. p. 15) is therefore demonstrably false.

4 Aaron Israel's Reply in Support of His Motion for Protective Order (filed Dec. 31, 2012), pp. 2-3, 5-13.

5 Also, even Plaintiffs admit that an expert's reliance on hearsay data requires that it be "customarily relied upon by experts in the field" and "sufficiently trustworthy to make reliance reasonable." (Opp. p. 15.) Plaintiffs argue that Dr. Obolsky's reliance on risk factors is a customary practice, but that is not the issue. The issue is that Plaintiffs told Dr. Obolsky that specific risk factors existed, and he opined based on that. It seems unlikely that in that profession, it is customary for a psychiatrist to opine that a patient has lost his faculties without ever examining the patient, and basing it on interviewing the people who are seeking a ruling that the patient has lost his faculties. In any event, proper foundation was never laid.

6 One likely reason is that support is at the heart of the tort of alienation of affections, and once children reach the age of majority they have no right to support from their parents. *Johnson*, 330 Ill. App. at 607 (tort applies to children until majority); *Clark v. Children's Mem'I Hosp.*, 2011 IL 108656, ¶ 33 ("The generally accepted common law rule is that parents have no obligation to support their adult children").

7 740 ILCS 5/1 states in part: "It is hereby declared, as a matter of legislative determination, that the remedy heretofore provided by law for the enforcement of the action for alienation of affections has been subjected to grave **abuses** and has been used as an instrument for blackmail by unscrupulous persons for their unjust enrichment, due to the indefiniteness of the damages recoverable in such actions and the consequent fear of persons threatened with such actions that exorbitant damages might be assessed against them. ... Accordingly, it is hereby declared as the public policy of the state that the best interests of the people of the state will be served by limiting the damages recoverable in such actions and by leaving any punishment of wrongdoers guilty of alienation of affections to proceedings under the criminal laws of the state, rather than to the imposition of punitive, exemplary, vindictive, or aggravated damages in actions for alienation of affections."

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